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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MAY - 6 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Petition of Bell Atlantic Corporation for	)	
Relief from Barriers to Deployment of	)	CC Docket No. 98-11
Advanced Telecommunications Services	)	
	)	
Petition of US WEST for Relief from Barriers	)	
to the Deployment of Advanced	)	CC Docket No. 98-26
Telecommunications Services	)	
	)	
Petition of Ameritech Corporation to Remove	)	
Barriers to Investment in Advanced	)	CC Docket No. 98-32
Telecommunications Services	)	

**REPLY COMMENTS OF NEXTLINK COMMUNICATIONS, INC.**

Howard J. Symons  
Michelle M. Mundt  
Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
202/434-7300  
  
Of Counsel

R. Gerard Salemmme  
Senior Vice President, External Affairs and  
Industry Relations  
Daniel Gonzalez  
Director, Regulatory Affairs  
NEXTLINK Communications, Inc.  
1730 Rhode Island Avenue, N.W.  
Suite 1000  
Washington, D.C. 20036  
202/721-0999

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Telecommunications Capability	)	

**REPLY COMMENTS OF NEXTLINK COMMUNICATIONS, INC.**

NEXTLINK Communications, Inc. ("NEXTLINK"),<sup>1/</sup> by its attorneys, hereby replies to the comments filed on the above-captioned petitions for relief.<sup>2/</sup> The petitioners have asked the Commission to forbear from applying numerous statutory and regulatory provisions, including the restrictions on their provision of in-region, interLATA service in section 271 and the interconnection, unbundling, and resale obligations of section 251(c). As the Commission

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<sup>1/</sup> NEXTLINK is a facilities-based competitive local exchange carrier with high capacity, fiber optic networks in a growing number of markets across the United States. NEXTLINK currently operates 16 facilities-based networks providing switched local and long distance services in 26 markets in eight states, including California, Illinois, Nevada, Utah, Ohio, Pennsylvania, Tennessee, and Washington. NEXTLINK anticipates adding or expanding markets to have approximately 21 million addressable lines by the end of 1999.

<sup>2/</sup> Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11, filed Jan. 26, 1998 ("Bell Atlantic Petition"); Petition of US WEST Communications Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26, filed Feb. 25, 1998 ("US WEST Petition"); Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability, CC Docket No. 98-32, filed March 5, 1998 ("Ameritech Petition") (jointly, "Petitioners").

evaluates the petitions, it should not lose sight of the effect that granting the requested relief would have on Congress's overall goal of opening the local exchange market to competition.<sup>3/</sup> Consistent with the incentive structure established by section 271, the Commission should not permit a regional Bell operating company ("BOC") to provide any in-region interLATA service before the local market is opened to competition fully and irreversibly.

NEXTLINK agrees with the petitioners that the deployment of advanced telecommunications capability to all Americans is a worthy goal and encourages the Commission to issue a Notice of Inquiry to determine whether this goal is being met. Such an inquiry may reveal that some relief is necessary. The regulatory relief that petitioners currently seek, however, cannot and should not be granted.

## **DISCUSSION**

### **I. FORBEARANCE FROM SECTIONS 251 AND 271 WOULD DISRUPT CONGRESS'S CAREFULLY CRAFTED SCHEME TO ENCOURAGE COMPETITION IN THE LOCAL EXCHANGE MARKET**

The petitioners have asked the Commission to forbear from applying numerous statutory and regulatory requirements to their provision of advanced services, including the restrictions on their provision of in-region interLATA service in section 271 and the interconnection,

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<sup>3/</sup> H.R. Conf. Rep. No. 104-458, at 113 (1996) (describing the purpose of the 1996 Act as providing for "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition") (emphasis added).

unbundling, and resale obligations of section 251(c).<sup>4/</sup> Petitioners argue that these provisions inhibit them from investing in and deploying advanced telecommunications services.<sup>5/</sup>

Sections 251(c) and 271 are the foundation of the process Congress created to open the local exchange market to competition. Under section 271, petitioners and other BOCs are prohibited from providing telecommunications services or information services across in-region LATAs until they demonstrate to the Commission that they have opened their local exchange markets to full competition.<sup>6/</sup> Under section 251(c), all incumbent local exchange carriers (“ILECs”) must negotiate interconnection agreements with competitors and provide them with unbundled access to network elements.<sup>7/</sup> Congress intended for section 271 to provide the BOCs with a strong incentive -- the prospect of providing in-region interLATA service -- to cooperate in the development of local competition.<sup>8/</sup> If BOCs are allowed to enter the in-region interLATA markets for data services prematurely, they will have substantially reduced incentives to

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<sup>4/</sup> Ameritech Petition at 2-3, 9-14, 22-15; Bell Atlantic Petition at 3, 17-21; US WEST Petition at 4, 42-51.

<sup>5/</sup> Id.

<sup>6/</sup> 47 U.S.C. § 271.

<sup>7/</sup> 47 U.S.C. § 251(c).

<sup>8/</sup> See 141 Cong. Rec. S8464 (daily ed. June 15, 1995) (statement of Sen. Dorgan) (“A series of specified steps – for example, the competitive checklist – is not by itself sufficient to bring real competition to local markets. The RBOCs must have a positive incentive to cooperate with the development of competition.”); 141 Cong. Rec. H8282 (daily ed. Aug. 2, 1995) (statement of Chairman Bliley) (“More importantly, the key to this bill is the creation of an incentive for the current monopolies to open their markets to competition.”); 141 Cong. Rec. S8139 (daily ed. July 12, 1995) (statement of Sen. Kerrey) (“The way to overcome the ability of the RBOC to thwart the open local markets is to give them a positive incentive to cooperate in the development of competition.”)

negotiate and implement access and interconnection agreements that provide new entrants with a meaningful opportunity to compete, in violation of the pro-competitive goals of the 1996 Act.

Granting regulatory relief from section 271 for data services could undermine the 271 process for basic as well as advanced services. NEXTLINK's experience with negotiating interconnection agreements with the petitioners is proof of the effectiveness of the 271 process. For example, NEXTLINK has negotiated an interconnection agreement with Bell Atlantic in New York that will allow it to offer reliable local telephone service fully bundled with enhanced products and services in the near future. Bell Atlantic's desire to receive regulatory approval to enter the long distance market operated as a powerful incentive for it to negotiate this agreement and continues to provide an impetus for Bell Atlantic to meet the performance standards contained in the agreement. To sustain the momentum of nascent competition in the local market, the Commission should not eliminate the incentives for petitioners to provide favorable terms in interconnection agreements by permitting them to enter the long distance data services market before the local market is fully and irreversibly open to competition.

If the petitioners truly wanted to enter the in-region, interLATA data services market, all they have to do is comply with the requirements of section 271. Instead of devoting their resources and energy to this clear path towards regulatory relief, however, the petitioners are engaging in yet another attempt to avoid their obligations under sections 251(c) and 271.<sup>9/</sup> The

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<sup>9/</sup> The BOCs have also sought to avoid these obligations through challenges to various aspects of the Telecommunications Act of 1996 and the Commission's implementation of that statute. See, e.g., Bell Atlantic Telephone Cos. v. FCC, No. 97-1432 (D.C. Cir. Dec. 23, 1997) (challenging FCC's interpretation of section 272); Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998) (challenging FCC's pricing rules); SBC Communications Inc. v. FCC, No. 7:97-CV-163-X (N.D. Tex. Dec. 31, 1997), appeal docketed, No. 98-10140 (5th Cir. Feb. 5, 1998) (challenging constitutionality of section 271); SBC (continued on next page)

Commission should recognize the petitions as the diversionary tactics that they are and deny them accordingly.

## **II. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO FORBEAR FROM APPLYING THE REQUIREMENTS OF SECTIONS 251(c) AND 271**

Even if the Commission determines that granting the petitioners some relief is necessary to encourage the deployment of advanced telecommunications services, it does not have the authority to forbear from applying the requirements of sections 251(c) and 271 at this point in time. The petitioners rely primarily on section 706 of the 1996 Act as the basis for the relief they seek.<sup>10/</sup> Section 706 directs the Commission and each State commission to:

encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local

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Communications Inc. v. FCC, No. 97-1425 (D.C. Cir. March 20, 1998) (challenging FCC's denial of section 271 application to provide interLATA service in Oklahoma); Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir. filed June 25, 1997) (challenging FCC's Universal Service Order). Additionally, Bell South has sought to avoid its obligation to open its network to local competitors by using an unregulated affiliate to provide local exchange services. See Petition for Declaratory Ruling or, in the Alternative, for Rulemaking on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act, filed March 23, 1998 by the Competitive Telecommunications Association, the Florida Competitive Carriers Association, and the Southeastern Competitive Carriers Association.

The BOCs have repeatedly engaged in such diversionary tactics despite their public acceptance of the section 251(c) and section 271 requirements when they were enacted. See Comments of Focal Communications Corporation, Hyperion Telecommunications Inc., KMC Telecom Inc., and McLeodUSA Incorporated at 9-10 ("Focal Comments") (quoting public testimony of Jim Cullen, Vice Chairman, Bell Atlantic Corporation, and Richard Brown, Vice Chairman, Ameritech Corporation, before the House Commerce Committee's Subcommittee on Telecommunications and Finance).

<sup>10/</sup> Bell Atlantic Petition at 5-10; US WEST Petition at 36-39; Ameritech Petition at 14.

telecommunications market, or other regulating methods that remove barriers to entry.<sup>11/</sup>

At the same time that Congress enacted section 706, however, it also added a specific provision granting the Commission the authority to forbear from applying the Communications Act to telecommunications carriers. This provision -- section 10 -- contains substantive standards and limitations on the Commission's forbearance authority.<sup>12/</sup> Section 10(a) of the Communications Act requires the Commission to forbear from regulation where the Commission finds that (1) enforcement is not necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.<sup>13/</sup> In determining whether forbearance is in the public interest, section 10(b) requires the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."<sup>14/</sup> Most importantly, section 10(d) expressly prohibits the Commission from forbearing from applying the requirements of sections 271 or 251(c) until those requirements have been fully implemented.<sup>15/</sup>

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<sup>11/</sup> § 706, 110 Stat. 56, 153.

<sup>12/</sup> 47 U.S.C. § 160.

<sup>13/</sup> § 160(a).

<sup>14/</sup> § 160(b).

<sup>15/</sup> § 160(d). See Focal Comments at 5-7, Comments of Teleport Communications Group at 5 ("TCG Comments"), Comments of the Association for Local Telecommunications Services at 5 ("ALTS Comments"), Comments of the Competitive Telecommunications Association at 9 ("CompTel Comments"), Comments of Excel Telecommunications Inc. at 4 ("Excel Comments"), Comments of LCI International Telecommunications Corp. at 19 ("LCI Comments"), Comments of Cablevision Lightpath at 7-8 ("CLI Comments"), Comments of GTE at 8 ("GTE Comments"), Comments of AT&T Corporation at 5-6 ("AT&T Comments"), Comments of MCI Telecommunications Corporation at 4, 22 ("MCI Comments").

If the BOCs' interpretation of section 706 were to prevail, there would be no limitations (other than the public interest requirement embodied in section 706 itself) on the Commission's authority to forbear in order to promote the deployment of advanced services. To promote advanced services, for instance, the Commission could presumably set prices for resale and unbundled network elements, notwithstanding the jurisdictional limits on Commission authority that petitioners have embraced.<sup>16/</sup> Petitioners would be hard-pressed to argue that section 706 is constrained by only certain provisions of title II – such as section 252(d) as interpreted by the Eighth Circuit – but not by others. Whatever the scope of the Commission's forbearance authority, however, it should be exercised to “promote competition in the local telecommunications market.”<sup>17/</sup>

In addition to the express prohibition in section 10(d), section 271 expressly states that “neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.”<sup>18/</sup> There is no indication that Congress sought to treat “data” services any differently for purposes of section 271. Where Congress wanted to permit the BOCs to provide telecommunications and information services without complying with section 271, it created specific exceptions, as it did for “incidental” services.<sup>19/</sup> It

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<sup>16/</sup> See, e.g., Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998).

<sup>17/</sup> § 706, 110 Stat. 56, 153. See Comments of Level 3 Communications, Inc. at 6-7.

<sup>18/</sup> 47 U.S.C. § 271(a).

<sup>19/</sup> 47 U.S.C. § 271(b)(3) (permitting BOCs to offer “incidental interLATA services”). Congress explicitly noted that the definition of incidental interLATA services was to be “narrowly construed,” 47 U.S.C. § 271(h), and none of the petitioners has even attempted to argue that the services they seek to provide would fall within this exception to section 271. See Focal Comments at 4, Comments of Electric Lightwave, Inc. at 27-28 (“ELI Comments”).



created no such exception for “data” services, demonstrating again its clear intent that the BOCs comply with the requirements of section 271 before providing any in-region interLATA services.

Well-settled principles of statutory construction dictate that a specific statutory provision like section 10 outweighs language of more general applicability like that found in section 706.<sup>20/</sup> When, as here, a provision in a statute specifically addresses forbearance from the very requirements cited by petitioners, that statutory provision must control. Because section 10(d) prohibits the Commission from forbearing from applying the requirements of sections 251(c) or 271 until those requirements have been fully implemented, and the petitioners are far from fully satisfying those requirements,<sup>21/</sup> the Commission may not forbear from applying sections 251(c) and 271 at this time. Once the local market is fully and irreversibly open to competition, the Commission will be able to apply the three-part test set forth in section 10 to determine whether the public interest will be served and competition enhanced by such forbearance.<sup>22/</sup>

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<sup>20/</sup> See TCG Comments at 3 (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1986); HSC-Laundry v. U.S., 450 U.S. 1, 8 (1981)); Focal Comments at 5-7 (citing Aeron Marine Shipping Co. v. United States, 695 F.2d 567 (D.C. Cir. 1982); In re Brown, 329 F. Supp. 422 (S.D. Iowa 1971)).

<sup>21/</sup> ALTS Comments at 22; ELI Comments at 28; Comments of ICG Telecom Group Inc. at 4-10 (“ICG Comments”).

<sup>22/</sup> The alternative bases that the petitioners propose for their requested relief are likewise without merit. For example, the petitioners request that the Commission “modify” the current LATA boundaries to create a single data LATA using its authority under section 3(25)(B). Ameritech Petition at 12-13; Bell Atlantic Petition at 3, 11. Section 3(25)(B) does not authorize the Commission to effectively repeal section 271 by completely eliminating LATA boundaries, for the same reasons that the Commission cannot use its section 706 authority to avoid the specific prohibitions of sections 10(d) and 271.

## CONCLUSION

As the Commission evaluates the petitions, it should keep in mind the harmful effect that premature BOC entry into the in-region, interLATA data services market would have on local competition. Even if the Commission determines that some relief is necessary to encourage the deployment of advanced telecommunications capability to all Americans, the Commission does not have the authority under section 10 to forbear from applying sections 251(c) and 271 because the requirements of those sections have not been fully implemented.

Respectfully submitted,

NEXTLINK COMMUNICATIONS, INC.

Howard J. Symons  
Michelle M. Mundt  
Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
202/434-7300

Of Counsel

May 6, 1998

/mm

R. Gerard Salemmme  
Senior Vice President, External Affairs and  
Industry Relations  
Daniel Gonzalez  
Director, Regulatory Affairs  
NEXTLINK Communications, Inc.  
1730 Rhode Island Avenue, N.W.  
Suite 1000  
Washington, D.C. 20036  
202/721-0999

## **CERTIFICATE OF SERVICE**

I, Michelle Mundt, hereby certify that on this 6th day of May 1998, I caused copies of the foregoing "Comments of NEXTLINK Communications, Inc." to be sent to the following by either first class mail, postage prepaid, or by hand delivery to the following:

A. Richard Metzger, Jr.\*  
Chief  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 500  
Washington, D.C. 20554

Richard Welch\*  
Deputy Bureau Chief  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 544  
Washington, D.C. 20554

Linda Kinney\*  
Attorney  
Policy and Program Planning Division  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 500  
Washington, D.C. 20554

John Nakahata\*  
Chief of Staff  
Office of Chairman Kennard  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

James Casserly\*  
Senior Legal Advisor  
Office of Commissioner Ness  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

Janice Myles\*  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 544  
Washington, D.C. 20554

Carol Matthey\*  
Chief  
Policy Division  
Federal Communications Commission  
1919 M Street, N.W., Room 544  
Washington, D.C. 20554

Jason Oxman\*  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 544  
Washington, D.C. 20554

Tom Power\*  
Legal Advisor  
Office of Chairman Kennard  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

Kyle Dixon\*  
Legal Advisor  
Office of Commissioner Powell  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

Paul Gallant\*  
Legal Advisor  
Office of Commissioner Tristani  
Federal Communications Commission  
1919 M Street, N.W., Room 826  
Washington, D.C. 20554

John Thorne  
Robert Griffien  
Bell Atlantic  
1320 North Court House Road, 8<sup>th</sup> Floor  
Arlington, VA 22201

John T. Lenahan  
Christopher Heimann  
Frank Michael Panek  
Ameritech  
2000 W. Ameritech Center Drive  
Room 4484  
Hoffman Estates, IL 60196-1025

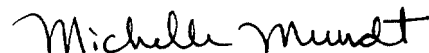
Robert B. McKenna  
Jeffrey Brueggeman  
US WEST, Inc.  
1020 19<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

Kevin Martin\*  
Legal Advisor  
Office of Commissioner Furchtgott-Roth  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

Richard Taranto  
Farr & Taranto  
Counsel to Bell Atlantic  
2445 M Street, N.W., Suite 225  
Washington, D.C. 20037

William T. Lake  
John H. Harwood, II  
Jonathan J. Frankel  
Counsel for US WEST, Inc.  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
Washington, D.C. 20036

ITS\*  
1231 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20554

  
Michelle Mundt

By Hand\*

DCDOCS: 127706.1 (2qj#01!.doc)